92-599

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ZOILO LINARES and DAVID MUNOZ,
Petitioners,

vs.

DANIEL SENKOWSKI, Superintendent of the Clinton Correctional Facility, and JOHN P. KEANE, Superintendent of the Sing Sing Correctional Facility,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 5, 1992

QUESTIONS PRESENTED

1. Are petitioners procedurally barred under this Court's decision in *Teague v. Lane* from raising a due process claim based upon their prosecution in state court by an assistant district "attorney" who was never admitted to practice law in any jurisdiction and who engaged in fraudulent, deceitful and criminal conduct throughout, and specifically in connection with, petitioners' grand jury proceeding and trial?

2. In particular, did the United States Court of Appeals for the Second Circuit err in holding petitioners' due process claim seeking a fair trial in a fair tribunal (a) was a "new rule" under *Teague v. Lane* and (b) did not fall within the "watershed rule" exception announced in *Teague v. Lane*?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ZOILO LINARES and DAVID MUNOZ

Petitioners,

-against-

DANIEL SENKOWSKI, Superintendent of the Clinton Correctional Facility, and JOHN P. KEANE, Superintendent of the Sing Sing Correctional Facility,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Zoilo Linares and David Munoz respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in *Linares v. Senkowski*, 964 F.2d 1295 (2d Cir. 1992).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 964 F.2d 1295 (2d Cir. 1992), and is annexed to this Petition at A-1 through A-7. The opinion of the United States District Court for the Southern District of New York is reported at *Munoz v. Keane*, 777 F. Supp. 282 (S.D.N.Y. 1992), and is annexed to this Petition at A-8 through A-21.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 26, 1992. On July 7, 1992, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing in banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Petitioners' State Court Conviction

On November 9, 1985, petitioners were arrested and charged with criminal possession and sale of a controlled substance (cocaine) in the first degree. Petitioners' case was assigned for all purposes to Daniel J. Penofsky, then an assistant district attorney in the Special Narcotics Prosecutor's Office for the City of New York. Penofsky alone handled all aspects of the case, including presentment of the case to the grand jury, pre-trial discovery and the trial.

Following a seven-day trial in May of 1986, a jury found petitioners guilty on all counts. On June 19, 1986, the New York Supreme Court, New York County (Berman, J.), entered judgments of conviction against petitioners. Petitioner Zoilo Linares was sentenced to two indeterminate prison terms of 17 years to life, to

run concurrently. Petitioner David Munoz was sentenced to two indeterminate prison terms of 20 years to life to run concurrently. Petitioners are presently incarcerated pursuant to their judgments of conviction.

B. Investigation of Penofsky By The DA's Office

In March 1989, three years after the trial of this case, an investigation conducted by the District Attorney's Office revealed that Penofsky, although a law school graduate, was not admitted to practice law, had never sat for or passed the New York State bar examination, and had never submitted documentation to the Character Committee of any New York Judicial Department in an effort to be admitted upon waiver of the bar examination due to reciprocity with another state. After Penofsky's fraud came to light, he was dismissed as an assistant district attorney, and the Attorney General commenced criminal proceedings against him. Penofsky pleaded guilty to one count of defrauding the People of the State of New York and one count of practicing law without a license.

C. Procedural History

Petitioners appealed their judgments of conviction to the New York State Appellate Division, First Department, asserting, *inter alia*, that Penofsky's fraudulent, deceitful and criminal conduct deprived them of a fair trial in a fair tribunal in violation of the Due Process Clause of the Fourteenth Amendment. On February 6, 1990, the intermediate state appellate court affirmed the petitioners' judgments of conviction in separate opinions reported as *People v. Munoz*, 153 A.D.2d 281, 550 N.Y.S.2d 691 (1st Dep't 1990), and *People v. Linares*, 158 A.D.2d 296, 550 N.Y.S.2d 703 (1st Dep't 1990).

On March 29, 1990, the New York Court of Appeals denied petitioners' requests for leave to appeal, but granted petitioners leave to renew their applications pending the outcome of the appeal in a case entitled *People v. Carter*, another criminal case prosecuted by Penofsky which the New York Court of Appeals had agreed to hear. On November 29, 1990, the New York Court of Appeals

handed down its opinion in *Carter*, which is reported at 77 N.Y.2d 95, 566 N.E.2d 119, 564 N.Y.S.2d 992 (1990), *cert. denied*, 111 S.Ct. 1599 (1991). The decision in *Carter* did not directly address the issue presented here — whether a defendant's trial is infected by the prosecutor's fraudulent, deceitful and criminal conduct in pursuit of conviction— but rather focused on a defendant's right to be prosecuted by an attorney. In a five to two decision, the court in *Carter* rejected the defendant's claim premised upon Penofsky's conduct because the defendant failed to demonstrate prejudice. 77 N.Y.2d at 107, 566 N.E.2d at 124, 564 N.Y.S.2d at 997. Following the decision in *Carter*, petitioners renewed their applications for leave to appeal. The applications were denied, thereby exhausting petitioners' state court remedies.

Petitioners then sought federal habeas review in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 2254. On November 6, 1991, the District Court denied petitioners' request for relief, holding that petitioners were not deprived of due process in the absence of a specific showing of prejudice and that Penofsky's fraudulent conduct was not in itself a violation of due process. 777 F. Supp. at 287 (A-14-A-15).

Petitioners appealed and the United States Court of Appeals for the Second Circuit affirmed on procedural grounds without reaching the merits of petitioners' due process claim. 964 F.2d at 1298 (A-7). Applying this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), the Second Circuit held that petitioners were seeking a "new rule" that did not fall within the "watershed rule" exception, and therefore petitioners' claim could not be raised on collateral attack. 964 F.2d at 1298 (A-7).

In barring petitioners' due process claim on technical grounds, the appellate court overlooked this Court's recent decision in *Stringer v. Black*, 112 S. Ct. 1130 (1992), and applied an incorrect standard for determining whether a rule is "new" under *Teague*. Alternatively, the appellate court misapplied the "watershed rule" exception in failing to recognize that the rule petitioners seek—requiring that a fair trial in a fair tribunal be free from fraud,

deception and criminal conduct on the part of the state's prosecutor—is "'implicit in the concept of ordered liberty.'" *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

On July 7, 1992, the Second Circuit denied a timely petition for rehearing and suggestion for rehearing in banc.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT COURT OF APPEALS MISAPPLIED THE "NEW RULE" TEST AND THE "WATERSHED RULE" EXCEPTION ANNOUNCED IN *TEAGUE*; IF THE CIRCUIT COURT'S DECISION IS PERMITTED TO STAND, THE IMPORTANT ROLE OF THE FEDERAL WRIT OF HABEAS CORPUS WILL BE EVISCERATED

The purpose of federal habeas corpus is to provide "'a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles.'" *Teague*, 489 U.S. at 306 (*quoting Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)). Habeas corpus is also meant "to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment).

The relevant inquiry in a federal habeas petition under 28 U.S.C. § 2254 is whether the state court followed federal case law in existence *at the time* the defendant's conviction became final; this is the underpinning for the "new rule" doctrine announced in *Teague*. *See Stringer*, 112 S.Ct. at 1140 ("The purpose of the new rule doctrine is to validate reasonable interpretations of existing precedents."). "Put differently, the new-rule enquiry asks 'whether a state court considering [the prisoner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution.'" *Wright v. West*, 112 S. Ct. 2482, 2500

(1992) (Souter, J., concurring) (*quoting Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

In this case, the facts giving rise to petitioners' due process claim were purposely concealed during the trial by the state's prosecutor, who is imbued in the New York State system with quasi-judicial responsibilities both at the grand jury and at the trial stage and who is not merely an advocate interested only in winning. These facts remained concealed until years after petitioners' convictions became final. The trial court was never made aware of the prosecutor's fraud and deception during the course of discovery, the grand jury proceeding or the trial. The relevant *Teague* inquiry here is to consider what action the trial court *would have* taken had the prosecutor's fraud been uncovered prior to the conclusion of the trial. There can be no doubt that had the trial court been aware of Penofsky's fraud and deception, the court would have declared a mistrial.

It subverts the purpose of habeas review to say, as the Second Circuit did, that *Teague* bars consideration of petitioners' claim even though the trial court clearly would have declared a mistrial if presented with petitioners' argument at the time of trial. If the federal habeas court is constrained to place itself in the shoes of the state court trial judge at the time of conviction, then the writ should be granted here. At the very least, the Second Circuit should have considered the merits of petitioners' due process claim. *Teague* and its progeny do not compel a contrary result.

A. Petitioners Rely On Well-Settled Precedent Decided Prior To The Time Their Convictions Became Final

Seventy years ago this Court recognized that the Due Process Clause guarantees a criminal defendant a full and fair hearing in state court. *See Ponzi v. Fessenden*, 258 U.S. 254, 260 (1922) ("One accused of crime has a right to a full and fair trial according to the law of the government whose sovereignty he is alleged to have offended"). The Court has applied this rule in many factual contexts. *See, e.g., Moore v. Dempsey*, 261 U.S. 86 (1923) (trial

dominated by an angry mob was inconsistent with due process); *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934) ("the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence"); *In re Murchison*, 349 U.S. 133 (1955) (contempt hearing before a biased judge violated due process). Thus, it has been settled law for decades that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136.

In this case, the prosecutor was conducting a fraud on the Court and on the People of New York, as well as the petitioners, throughout the grand jury and trial proceedings. He was not licensed to practice law, was not an officer of the court, and continuously engaged in fraudulent and deceitful conduct by pretending that he was, under oath and otherwise, during the course of handling petitioners' case on behalf of the People of New York, all in violation of New York's criminal laws. The prosecutor is a quasi-judicial officer, *see People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497, 498 (1899), and his role in the criminal justice system in carrying out his quasi-judicial functions (*e.g.*, disclosing "Brady material" and witness statements) can be no less important to securing a "fair trial in a fair tribunal" than the role of an impartial judge. *Murchison*, 349 U.S. at 136.

B. The Rule Petitioners Seek Is Not "New" Because It Cannot Be Meaningfully Distinguished From Precedent Existing At The Time Petitioners' Convictions Became Final

Under *Teague*, a habeas petitioner cannot raise a claim which seeks to establish a new rule of law. 489 U.S. at 301. In *Stringer v. Black*, 112 S. Ct. 1130 (1992), the Court held that the standard for determining whether a petitioner seeks to establish a new rule is "objective," and the mere existence of conflicting authority does not necessarily mean a rule is new. *Id.* at 1140.

The defendant in *Stringer* was sentenced to death for a capital murder based upon a jury determination that there existed three statutory aggravating factors. *Stringer*, 112 S. Ct. at 1134. One of

those factors was a finding that the murder was "especially heinous, atrocious or cruel." *Id.* The defendant claimed that this aggravating factor was so vague as to render the sentence arbitrary, in violation of the Eighth Amendment. *Id.* The issue before the Supreme Court was whether defendant's claim was a new rule under *Teague*. *Id.* at 1135.

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), a case decided before the conviction in *Stringer* became final, the Court had invalidated a death sentence based upon the aggravating circumstance that the killing was "outrageously or wantonly vile, horrible and inhuman." *Godfrey*, 446 U.S. at 428-29. The *Stringer* Court held that "it would be a mistake to conclude that the vagueness ruling of *Godfrey* was limited to the precise language before [the Court] in that case." *Stringer*, 112 S. Ct. at 1135. The *Stringer* Court analyzed the legal principles emerging from its long line of authority setting forth the constitutional criteria for sentencing, and expressly rejected the requirement suggested by the dissent that the governing principle must emerge from a single case. *Id.* at 1137. The *Stringer* Court ultimately held that the defendant's claim was *not* a new rule because precedents had established the well-settled (and general) principle that a vague or imprecise aggravating factor invalidates the sentence. *Id.* at 1140.

In *Wright v. West*, 112 S. Ct. 2482 (1992), a case decided after *Stringer*, the Court addressed the "new rule" test under *Teague*, but was sharply divided on the inquiry to be made. In the Court's plurality opinion in *Wright*, joined in by the Chief Justice and Justice Scalia, Justice Thomas wrote that under *Teague* and its progeny, the inquiry is whether "the state courts have interpreted old precedents *reasonably*." *Id.* at 2490 n.8.

Five Justices in *Wright* appear to disagree with Justice Thomas's view. In a concurring opinion joined in by Justice Blackmun and Justice Stevens, Justice O'Connor wrote that the proper inquiry is "whether the rule . . . can be *meaningfully distinguished* from that established by binding precedent at the time [petitioner's] state court conviction became final." *Id.* at 2497

(O'Connor, J., concurring) (emphasis added). Justice O'Connor added:

> If a proffered factual distinction between the cases under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.

Id. at 2497 (O'Connor, J., concurring).

In a separate concurring opinion, Justice Kennedy also favored a less stringent test:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule. . . . Where the beginning point is a rule of [] general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Id. at 2499 (Kennedy, J., concurring).

In another concurring opinion, Justice Souter noted that the "new rule" test does not require a habeas petitioner "to point to an old case decided on facts identical to the facts of his own." *Id.* at 2502 (Souter, J., concurring).

In this case, the Second Circuit held that the legal principle affirmed in *Murchison*—every defendant is entitled to a fair trial in a fair tribunal—was too general to save petitioners' claim from being labelled a "new rule." 964 F.2d at 1297 (A-5). The Second Circuit concluded that the relief sought by petitioners is not required by any prior decision because there is no case specifically addressing the situation where "a prosecutor fraudulently represents

that he or she is licensed to practice law . . . ." 964 F.2d at 1297 (A-5).

The Second Circuit's decision is inconsistent with *Stringer* because it holds petitioners' claim to be a new rule based merely upon the absence of precedent specifically addressing the particular and unique facts of this case. The Second Circuit erred because the rule sought by petitioners requiring a fair trial in a fair tribunal "is one which of necessity requires a case-by-case examination of the evidence," and therefore application of that rule to the facts of this case does *not* create a new rule. *Wright*, 112 S. Ct. at 2499 (Kennedy, J., concurring).

Here, the entire trial process was irreparably corrupted by the prosecutor's fraud and deceit. The Second Circuit acknowledged that the prosecutor himself had committed perjury (964 F.2d at 1297; A-5) and had engaged in other specific acts of misconduct relating to his fraud (964 F.2d at 1297; A-4 n.1). The fairness of the proceeding depended in substantial part upon Penofsky truthfully and candidly performing his quasi-judicial functions, which included the disclosure of *Brady* material and witness statements and the ability to make accurate representations to the court and defense counsel on these and other matters. The fact that *Murchison* (or any of the earlier decisions) did not involve a prosecutor who was masquerading as an attorney and conducting a fraud on the court and others does not turn petitioners' claim into a new rule because a fair trial in a fair tribunal must necessarily be one which is uncorrupted and free of pretense in its essential parts. *See Stringer*, 112 S. Ct. at 1137, 1140; *Wright*, 112 S. Ct. at 2497 (O'Connor, J., concurring), 2499 (Kennedy, J., concurring), 2502 (Souter, J., concurring).

C. Alternatively, The Egregious Circumstances Of This Case Fall Within The "Watershed Rule" Exception Announced In *Teague*

After determining that petitioners' claim was a new rule, the Second Circuit went on to hold that the claim does not fit within the

exception announced in *Teague* for watershed rules of criminal procedure. 964 F.2d at 1298 (A-7). The Second Circuit based its determination upon two cases in which the Supreme Court held that the rules announced in *Batson v. Kentucky*, 476 U.S. 79 (1986) (use of peremptory challenges by prosecution to exclude minority jurors violates Equal Protection), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (prosecutor's diminishing of a jury's sense of responsibility for imposing death sentence violates Eighth Amendment), were new rules falling outside the exceptions to *Teague*. 964 F.2d at 1298 (A-6-A-7).

The Second Circuit has misapprehended the watershed rule exception and the critical distinction between a rule that is a prerequisite to a fair trial and one that simply extends and refines existing precedent to enhance the reliability of a trial. Under basic concepts of due process, the prosecutor entrusted by the state to carry out quasi-judicial responsibilities may not at the same time corrupt the process by defrauding the court, the People of New York and the petitioners as to his true capacity and conceal his fraud by repeatedly making false statements to the court, under oath. Petitioners are seeking nothing more than a recognition of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 311 (*quoting Mackey v. United States*, 401 U.S. 667, 693 (Harlan, J., concurring in part and dissenting in part)). Without observance of such procedures, "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313.

Therefore, even if petitioners' claim is deemed a "new rule," it is not barred under *Teague* by virtue of the watershed rule exception. A rule requiring that all of the participants in the trial process be who they purport to be, and at a minimum, that the prosecutor entrusted with quasi-judicial obligations refrain from engaging in fraudulent and deceptive criminal conduct in furtherance of the prosecution, would "not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." *Sawyer v.*

Smith, 497 U.S. 227, 110 S. Ct. 2822, 2831 (1990) (*quoting Teague*, 489 U.S. at 311).

CONCLUSION

For all the foregoing reasons, petitioners Zoilo Linares and David Munoz respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
October 5, 1992

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS
(May 26, 1992)

Nos. 1320, 1321
Argued: April 8, 1992

August Term 1991
Decided: May 26, 1992
Docket Nos. 91-2605, 92-2001

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ZOILO LINARES and DAVID MUNOZ,
Petitioners-Appellants,

—against—

DANIEL SENKOWSKI, Superintendent of the Clinton Correctional Facility, and JOHN P. KEANE, Superintendent of the Sing Sing Correctional Facility,
Respondents-Appellees.

Before: FEINBERG, WINTER and ALTIMARI, Circuit Judges

Appeal from orders denying appellants' petitions for writs of habeas corpus in the United States District Court for the Southern District of New York, Louis J. Freeh, J., rejecting the claim that their prosecution by an unlicensed attorney violated the Due Process Clause of the Fourteenth Amendment.

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for Petitioners-Appellants.

Robert M. Morgenthau, District Attorney,
(New York County
Mark Dwyer, Assistant District
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for Respondents-Appellees

FEINBERG, Circuit Judge:

Appellants, two of six individuals charged in connection with the criminal sale and possession of a controlled substance, appeal from orders of the United States District Court for the Southern District of New York, Louis J. Freeh, J., dated November 4, 1991, denying their petitions for writs of habeas corpus. Appellants claim that their convictions violated the Due Process Clause of the Fourteenth Amendment because the prosecutor fraudulently represented himself as an admitted attorney when he was in fact never admitted to the bar. For the reasons given below, we affirm.

BACKGROUND

This appeal arises from the November 1985 indictment of appellants Zoilo Linares and David Munoz and their co-defendants, Elmer Sanchez-Medina, Edimer Rosero, Livia Del-Rosario and Irma Posada, for the criminal sale and possession of cocaine. *Munoz v. Keane*, 777 F. Supp. 282, 283 (S.D.N.Y. 1991). Two of the original defendants pled guilty, and the remaining four, including appellants, were tried in May 1986. Id. at 283. At trial, the evidence that Linares and Munoz sold and possessed 3.6 pounds of cocaine was overwhelming, and they were convicted in June 1986. Linares was sentenced to concurrent prison terms of 17 years to life, and Munoz was sentenced to concurrent prison terms of 20 years to life. Id.

Daniel J. Penofsky, a former assistant district attorney in the Special Narcotics Prosecutor's Office, had presented the case against appellants to the grand jury, handled pre-trial discovery and tried the case. In March 1989, an investigation conducted by the District Attorney's office revealed that Penofsky was not admitted to practice law in New York, that he had either never sat for or never passed the New York State bar examination, and that he had never submitted documentation to the Character Committee of any New York Judicial Department in an effort to be admitted upon waiver of the bar examination due to reciprocity with another state. See *People v. Munoz*, 550

N.Y.S.2d 691, 692 (1st Dep't 1990), *appeal denied*, 75 N.Y.2d 922 (1990). After Penofsky's fraud came to light, he was dismissed as an assistant district attorney, *People v. Munoz*, 550 N.Y.S.2d at 692, and in January 1991, following a plea of guilty, he was convicted of one count of defrauding the government and of one count of practicing law without a license.

Upon learning of Penofsky's fraud, appellants sought to have their convictions reversed. While appellants' case was pending in the state courts, the New York Court of Appeals had occasion to consider the same issue as that raised by appellants, see *People v. Carter*, 77 N.Y.2d 95 (1990), *cert. denied*, 111 S. Ct. 1599 (1991), and appellants were given the opportunity to renew their applications for leave to appeal their convictions pending the outcome of that case. *Munoz v. Keane*, 777 F. Supp. at 284 n.5. The New York Court of Appeals rejected the defendants' claim in *Carter* that their prosecution by an unlicensed attorney (also Penofsky) denied them Due Process under the Federal and State Constitutions.

After exhausting their state-court remedies, appellants petitioned the district court for writs of habeas corpus. Their petitions were denied on the merits, *Munoz v. Keane*, 777 F. Supp. at 289, and this appeal followed.

DISCUSSION

Appellants argue that criminal defendants have a constitutional right to be prosecuted by attorneys who do not falsely hold themselves out to be admitted attorneys. Appellants contend that trials in which prosecutors pretend to be what they are not violate the Due Process Clause by denying defendants "[a] fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). Although appellants cannot point to any particular act of the prosecutor during the proceedings that prejudiced them, they assert that where a prosecutor, a "quasi-judicial officer," has falsely represented that he is an attorney, as Penofsky has, the

defendants need not demonstrate prejudice to have their convictions vacated.[1]

Because this case does not come to us on direct appeal from a federal conviction but on an appeal from the denial of habeas corpus to state prisoners, we are required to consider whether the argument pressed by appellants, if accepted, would establish a new constitutional rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 301 (1989). If such a holding would create a new rule, then we may not reach the merits of appellants' argument because new rules may not be applied or announced in a habeas corpus proceeding.[2] Id. at 300-01, 307; *Sawyer v. Smith*, 100 S. Ct. 2822, 2831 (1990).

New Rules

The standard for determining whether the right asserted by appellants is a "new rule" under *Teague* involves an assessment of whether or not the rule is "*dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301. In examining the precedents, we have reviewed a rule related to that proposed by appellants. The rule holds that a prosecutor who knowingly allows a government witness to commit perjury deprives the defendant of Due Process. See *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Napue v. Illinois*, 360 U.S. 264, 259 (1959). We have concluded, however, that a reasonable interpretation of this rule might limit it to situations in which a prosecutor has allowed perjury to be

---

1. Appellants do present specific instances of alleged misconduct on the part of the prosecutor during their trial. But appellants do not allege specifically how this misconduct prejudiced the outcome of the case. Appellants claim that if they must demonstrate prejudice, then they are entitled to discovery. However, since appellants only speculate that the outcome was prejudiced and present only general allegations in support of this speculation, they are not entitled to a remand for discovery. *Harris v. Nelson*, 394 U.S. 286, 300 (1969).
2. There are two exceptions to this doctrine, under which a new rule may be applied in a habeas corpus proceeding, see infra.

presented to the trier of fact determining the guilt or innocence of the defendant. Where, as in our case, the only perjury committed was the prosecutor's signing of documents as an admitted attorney, documents that the trier of fact—the jury—did not see, a state court could reasonably distinguish *Giglio* and *Napue* and find no rule requiring reversal of appellants' convictions.

We simply cannot find that the federal constitutional right asserted is dictated by precedent. Indeed, appellants do not cite even one federal case that closely resembles ours.[3] Of course, as appellants correctly point out, every defendant has the right to a fair trial. Obviously, this right does not constitute a new rule. But, if a habeas corpus petitioner can describe the right sought at so high a level of generality, it is difficult to see how anything could be termed a new rule. This result is clearly inconsistent with *Teague* and its progeny. If we instead, and more reasonably, describe what appellants seek as a rule holding unconstitutional those proceedings in which a prosecutor fraudulently represents that he or she is licensed to practice law, such a rule is not required by any prior decision. We conclude therefore that the rule appellants ask us to announce would constitute a "new rule" under *Teague*.

New Rules That Apply On Habeas Corpus

That appellants ask this court to announce a new rule in a habeas corpus proceeding does not itself resolve our inquiry. The Supreme Court has articulated two "narrow exceptions" to *Teague*, *Saffle v. Parks*, 494 U.S. 484, 486 (1990), describing circumstances under which a new rule may be applied on collateral review: "The first of these applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law . . ., or new rules that prohibit imposition of a

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3. Appellants do cite *People v. Munson*, 319 Ill. 596 (1925), which vacated a conviction obtained by an unlicensed prosecutor. This decision, however, was based on state rather than federal law.

certain type of punishment for a class of defendants because of their status or offense . . . . The second . . . applies to new 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of the criminal proceeding. *Sawyer v. Smith*, 110 S. Ct. at 2831 (citations omitted). Because the first exception has no application here, we turn to appellants' argument that the rule they advocate in this case is a "watershed" rule of criminal procedure.

In considering this issue, it should first be noted that there is a long-standing tradition of lay prosecutions for misdemeanor offenses in New York. See, e.g. *People v. Van Sickle*, 13 N.Y.2d 61, 63 (1963) (Van Voorhis, J., concurring) (nothing that "petty crimes or offenses of this nature may be prosecuted by administrative officers"); *People v. Black*, 156 Misc. 516, 519 (Co. Ct. Oswego Co. 1935); cf. N.Y. Judiciary Law § 484(2) (McKinney Supp. 1992).

Appellants claim that the entire criminal process was infected by the fact that Penofsky was engaged in a fraud. They argue that "a valid prosecution may not be based on a fraud perpetrated on the court and the People from its inception." We must examine appellants' claims in light of what the Supreme Court has stated regarding the second exception to the *Teague* doctrine: "Because we operate from the premise that such procedures [new rules not barred by *Teague*] would be so central to an accurate determination of innocence or guilt; we believe it unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. Further guidance with respect to determining which new rules apply in a habeas corpus proceeding emerges from a consideration of the new rules that the Supreme Court has itself refused to designate under this exception. In *Teague*, for example, the Supreme Court refused to apply *Batson v. Kentucky*, 476 U.S. 79 (1986), in reviewing a petition for habeas corpus challenging convictions that became final prior to *Batson*. See *Teague v. Lane*, 489 U.S. at 315. The Court in *Batson* found a violation of Equal Protection where a prosecutor used peremptory challenges to exclude members of the

defendant's race from the petit jury, and the Court there articulated the standard for assessing such a violation. In *Sawyer v. Smith*, 110 S. Ct. at 2832-33, the Supreme Court held that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) could not be applied in a habeas corpus proceeding in which the underlying conviction became final before the Court decided *Caldwell*. The Court in *Caldwell* announced that it was constitutionally impermissible under the Eighth Amendment to rest a death sentence on a determination by a jury that had been led by the prosecutor to believe that it did not bear ultimate responsibility for determining the propriety of the defendant's death sentence. 472 U.S. at 328-29.

Both the *Batson* and *Caldwell* rules implicate the accuracy of a jury's determinations at least to the same extent as does the honesty of a prosecutor: Both the exclusion of members of a defendant's race from a petit jury and the diminishing of a jury's sense of responsibility for imposing the death sentence raise the possibility that the outcome of a case reflects something other than a thorough and proper assessment of the evidence. The Supreme Court, however, did not see fit to consider either new rule a *Teague* exception. Neither rule qualified as a bedrock or watershed principle. While we express no view on whether we would adopt direct appeal from a federal conviction, we cannot say that the rule is so fundamental to Due Process that it satisfies the narrow *Teague* exception for "'watershed rules of criminal procedure'" that "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer v. Smith*, 110 S. Ct. at 2831 (citations omitted).

Because appellants seek the benefits of a new rule that does not come within either of the *Teague* exceptions, their claims for habeas corpus relief are without merit.

The judgment of the district court is therefore affirmed.

OPINION OF THE DISTRICT COURT
(November 4, 1991)

91-CIV-0954 (LJF)
91-CIV-3195 (LJF)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

MUNOZ,

Petitioner,

—against—

KEANE,

Respondent.

LINARES,

Petitioner,

—against—

SENKOWSKI,

Respondent.

ORDER AND OPINION

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LOUIS J. FREEH, U.S.D.J.

In these related cases, *Linares v. Senkowski* (91-CIV-3195) and *Munoz v. Keane* (91-CIV-0954), petitioners Zoilo Linares ("Linares") and David Munoz ("Munoz") seek writs of habeas corpus, primarily on the grounds that their prosecution by an individual not admitted to the bar of New York or any other state violated the due process clause of the federal constitution.[1] Linares and Munoz were co-defendants, tried by the same prosecutor, in a single trial. For the reasons stated below, the petitions are denied.

FACTS

On November 9, 1985, Linares and Munoz were arrested with four other individuals[2] and charged with first degree criminal possession and criminal sale of a controlled substance (cocaine). In May 1986, Linares and Munoz were tried on those charges along with Rosero and Sanchez-Medina,[3] and on June 19, 1986, they were convicted on both counts. Linares was sentenced to concurrent prison terms of seventeen years to life, and Munoz was sentenced to concurrent terms of twenty years to life.

The prosecutor that tried Linares and Munoz on behalf of the People of New York was Daniel J. Penofsky ("Penofsky"), a former assistant district attorney in the Special Narcotics Prosecutor's Office. An investigation conducted by the District Attorney's office in March 1989 disclosed that while Penofsky had graduated from law school, he had never been admitted to practice law in New York, that he had never sat for and thus never passed the New York bar examination, and that he had never submitted the documents necessary to obtain admission to the New York bar upon waiver of the examination requirement. *People v. Munoz*, 550 N.Y.S.2d 691,

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1. Both Linares and Munoz also raise other grounds for reversal of their convictions. Those additional grounds will be discussed below.
2. Edimer Rosero ("Rosero"), Elmer Sanchez-Medina ("Sanchez-Medina"), Irma Posada ("Posada") and Livia Del-Rosario ("Del-Rosario").
3. Posada and Del-Rosario pled guilty.

692 (1st Dept. 1990). Once this information became public, Penofsky resigned as an assistant district attorney. *Id.*

Both petitioners claim that because Penofsky was not an attorney admitted to practice law in New York, their trial was inherently unfair, in violation of the due process clause of the 14th amendment.[4] Both petitioners have also raised these claims in state court.[5]

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4. On direct appeal, both petitioners also sought to have their indictments dismissed, arguing that an unadmitted prosecutor's presentation of a case to the grand jury constitutes the presence of an unauthorized person during grand jury proceedings, in violation of CPLR 190.25(3)(a). Both the Appellate Division and the New York Court of Appeals rejected this claim, which petitioners do not reassert here. *See People v. Carter*, 564 N.Y.S.2d 992, 996 (1990); *People v. Munoz, supra*, 550 N.Y.S.2d 691, 693 (1st Dept. 1990); *People v. Linares, supra*, 550 N.Y.S.2d 703 (1st Dept. 1990).

5. On February 6, 1990, the Appellate Division, First Department affirmed both convictions. *Munoz, supra*, 550 N.Y.S.2d 691 (1st Dept. 1990); *People v. Linares*, 550 N.Y.S.2d 703 (1st Dept. 1990). On March 29, 1990, the New York Court of Appeals denied both Linares' and Munoz' requests for leave to appeal. 555 N.Y.S.2d 39, 555 N.Y.S.2d 41. The Court of Appeals specifically stated, however, that petitioners would be permitted to renew their applications pending the outcome of another appeal involving the same unadmitted prosecutor, *People v. Carter*, 564 N.Y.S.2d 992 (1990).

   The Court of Appeals decided *Carter* on November 29, 1990, and held that, in the absence of a showing of prejudice to the defendant, a prosecutor's non-lawyer status does not constitute a denial of due process. *Id.* at 997. Following that decision, Linares and Munoz renewed their applications for leave to appeal, claiming that they could demonstrate prejudice. On January 11, 1991, the court denied Linares' application, 567 N.Y.S.2d 209, and on February 19, 1991 also denied Munoz'. 568 N.Y.S.2d 923.

DISCUSSION

1. The Constitutional Claims

Linares and Munoz both claim that their prosecution by a "layman" deprived them of the safeguards necessary to ensure a fair trial. According to petitioners, the fact that Penofsky committed fraud in representing himself as an attorney indicates that he did not and could not comply with the constitutionally-imposed obligations of a prosecutor, such as the prosecutor's duty to (1) review evidence favorable to the accused, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); (2) disclose to the defense all witness statements relating to a witness' testimony, *Jencks v. United States*, 353 U.S. 657, 672, 77 S. Ct. 1712, 1723 (1957); and (3) when challenged, present a neutral explanation for any apparently discriminatory use of peremptory challenges during jury selection. *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 1723 (1986). (Linares Petition at 15-16).[6]

Petitioners are correct in asserting that prosecutors have numerous obligations of constitutional dimensions.[7] The Supreme Court has repeatedly emphasized that "while (a prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every

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6. As indicated above, Munoz is proceeding here *pro se*, while Linares has obtained private counsel. Munoz has submitted no briefs in support of his habeas petition. We assume for purposes of this decision, however, that Munoz' constitutional claims are identical to Linares' and rely on the substantial memorandum of law submitted by Linares' counsel in assessing those claims.

7. Prosecutors are also subject to substantial ethical restrictions. *See Imbler v. Pachtman*, 424 U.S. 409, 429, 96 S. Ct. 984, 994 (1976)(granting prosecutors absolute immunity from future civil actions, in part because of prosecutors' ethical obligations, citing ABA Code of Professional Responsibility).

legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935).

Petitioners claim that their trial was not a "fair legal proceeding, as required by the Due Process Clause" because "[e]ach statement and representation uttered by Penofsky during the course of the trial and . . . pre-trial discovery is tainted by his unlawful conduct." (Linares Petition at 15). In essence, petitioners have formulated a new constitutional right -- the right to be prosecuted by a licensed attorney. Apparently, no federal court has ever recognized such a right under the due process clause of the fourteenth amendment.

Petitioners cite only one state case, *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1925), imposing a requirement that a prosecuting attorney be licensed. In *Munson*, the Illinois Supreme Court vacated a criminal conviction on the grounds that the prosecutor was not an admitted attorney. In reaching that result, the Court noted that neither the state constitution nor any state statute required a criminal defendant to be prosecuted by a licensed attorney. 150 N.E. at 281. Nevertheless, the Court imposed such a requirement as a matter of common law, stating:

> (The state's attorney) is intrusted with broad official discretion. He is given power to file informations, sign indictments, and to sue out writs of subpoena and summons, thereby, in a measure, exercising the power of the court in representing the people in their cases. Both logic and the weight of authority require that one who discharges those duties have the qualifications of such an officer... [I]f he be an attorney for the people, he must be qualified to represent his client at law.

[*Id.* at 281-282.]

Despite the broad language quoted above, *Munson* is not analogous to this case. The central issue in *Munson* was the validity, as a matter of state law, of an indictment obtained by an unlicensed

attorney. 150 N.E. at 280. The New York courts have already addressed that question in *Carter*. Moreover, the Illinois court did not even discuss whether any federal constitutional rights were threatened by the prosecutor's unadmitted status.

Contrary to petitioners' claims, a prosecution conducted by an unlicensed attorney does not "violate[] a defendant's right to fair procedure [or] deprive[] him of constitutional safeguards guaranteed under the Due Process Clause." (Linares Petition at 13). The due process clause requires a fair trial, not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436 (1986). While it is obviously preferable that a prosecutor be licensed to practice law in the jurisdiction in which he or she practices, the fact that a prosecutor is not admitted does not necessarily undermine the fairness of the trial process.[8]

Of course, the Second Circuit has found that the opposite does not hold true, and requires that a criminal defendant be represented by an admitted attorney. *See United States v. Novak*, 903 F.2d 883 (2d Cir. 1990) (reversing conviction where defense counsel obtained bar admission by false pretenses); *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983) (same; defense counsel never admitted to the bar). However, defense counsel's distinct role in a criminal proceeding justifies treating the two situations differently.

A criminal defendant's right to counsel is a fundamental constitutional right, basic to a fair trial. *See* U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963). "Assistance of counsel is mandated by the Sixth Amendment

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8. Petitioners put great emphasis on the existence of ethical sanctions as a "check on Penofsky's exercise of the prosecutorial power." (Linares Petition at 15). While it is true that as an unlicensed attorney, Penofsky was not subject to professional discipline, other "checks" on his behavior did exist. Not only were all the normal constitutional protections applicable to a criminal prosecution in effect here, Penofsky, like all prosecutors, had to be aware that were he to abuse his power and violate a defendant's constitutional rights, the conviction would likely be overturned either on direct appeal or by collateral attack.

because lawyers 'are the means through which the other rights of the person on trial are secured,' and through which the prosecution's case is subjected to 'meaningful adversarial testing.'" *Novak*, 903 F.2d at 886 *(quoting United States v. Cronic*, 466 U.S. 648, 653, 656, 104 S. Ct. 2039, 2043, 2045 (1984)). Defense counsel's sole responsibility in a criminal trial is to protect the defendant's interests.

By contrast, a prosecutor acts as a criminal defendant's adversary. While a prosecutor is obligated to seek justice, not only a conviction, a criminal defendant does not rely on a prosecutor to protect his rights. As a result, the fact that a prosecutor may be unlicensed to practice law has far fewer repercussions for the defendant than if his own counsel is not admitted. Where, as here, defense counsel and an impartial trial judge are capable of monitoring the prosecutor's conduct in order to ensure that no constitutional violations occur, it would be inappropriate to conclude that a due process violation automatically results from the prosecutor's unlicensed status.[9]

The rationale for the new constitutional right proposed by petitioners is, presumably, that a prosecutor who lies about his bar admission cannot be trusted and may lie about other matters. That rationale, while facially appealing, could be used to overturn convictions even where the prosecutor is an admitted attorney if a criminal defendant can obtain evidence of other "dishonest" behavior on the part of the prosecutor, such as a failure to pay parking tickets or failure to file timely income tax returns. While this type of dishonest conduct on the part of a prosecutor is undesirable and may in fact lead to a prosecutor's dismissal, it is not grounds for a presumption that whenever a prosecutor "lies" about any matter - whether related to the criminal prosecution or

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9. Under a number of recent Supreme Court decisions, it is especially inappropriate for federal courts to recognize "new" constitutional rights in the context of a habeas corpus petition. *See Sawyer v. Smith*, ____ U.S. ____, 110 S. Ct. 2822, 2827 (1990) *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989).

not - criminal proceedings conducted by that prosecutor during the time of the dishonest conduct were unfair. Such a rule would effectively put prosecutors on trial, a complete reversal of the normal procedure for criminal prosecutions.

We also cannot ignore the practical implications of accepting petitioners' due process claim -- every defendant convicted by Penofsky during his fourteen-year tenure as a prosecutor would be entitled to a new trial. Petitioners have not demonstrated a sufficient basis for invalidating such a large number of cases and have not suggested any way to limit the scope of their proposed constitutional rule. Accordingly, we decline to adopt it.

Even if we were to accept that there is a constitutional right to be prosecuted by a duly admitted attorney, an alleged constitutional violation will be considered harmless error unless that violation constitutes a "structural defect[] in the constitution of the trial mechanism" rather than "an error in the trial process itself." *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 1265 (1991). Unlike the right to defense counsel or trial before an unbiased judge, constitutional rights "so basic that their infraction can never be treated as harmless error," *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824-27 (1967), the "right" asserted here—to be prosecuted by an attorney licensed to practice law—does not qualify as a "structural defect ... [in] the trial mechanism." Accordingly, reversal of petitioners' convictions is only appropriate if petitioners can demonstrate that Penofsky's conduct prejudiced them in some way.

Petitioners cannot show any such prejudice. No one disputes that Penofsky's conduct in misrepresenting himself as an admitted attorney was reprehensible and a clear violation of New York Judiciary Law § 478, which makes it unlawful for any unlicensed person to appear as an attorney-at-law. However, petitioners have not shown that Penofsky's status impacted his prosecution of this case. In the absence of any evidence that Penofsky failed to meet his constitutional obligations to petitioners, the requested relief must be denied.

Petitioners have also requested leave to take discovery to establish facts that would demonstrate they were prejudiced by Penofsky's conduct. The rules applicable to habeas corpus petitions state that, with leave of the Court, a petitioner may employ all the discovery tools available under the Federal Rules of Civil Procedure. 28 U.S.C. § 2254, rule 6. Leave to conduct discovery should be granted to habeas petitioners only for good cause shown. *Id.*

Petitioners have not demonstrated any such "cause." Petitioners make only generalized statements about the possible existence of exculpatory *Brady* material that Penofsky may have withheld. Similarly, petitioners claim that they may be able to discover some evidence suggesting Penofsky deliberately acted to exclude minorities from the jury. (See discussion below). However, petitioners are not entitled to go on a fishing expedition through the government's files in the hopes of finding some damaging evidence. Because petitioners have not produced any specific evidence that supports their claims that *Brady* materials or evidence of discrimination exists, no discovery will be permitted.

2. Discriminatory Use of Peremptory Challenges

Both Linares and Munoz[10] claim that Penofsky exercised his peremptory challenges to discriminate against minorities, in violation of the equal protection clause of the fourteenth amendment. *Batson v. Kentucky, supra*, 476 U.S. 79, 106 S. Ct.

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10. Respondent argues that Munoz "forfeited" his right to raise this and any claims other than the challenge regarding Penofsky's bar status. (Respondent's Brief at 30). In his original appeal to the New York Court of Appeals, Munoz raised all of the claims asserted here. Munoz failed, however, to include all such claims in his renewed appeal to that Court after the *Carter* decision. (Respondent's Brief at 30-31). Technically, such a failure may be grounds to foreclose consideration of those claims by this Court. *Grey v. Hoke*, 933 F.2d 117 (2d Cir. 1991). However, we must address at least one of Munoz' other arguments in any event because Linares raises it as well. Accordingly, we will also address Munoz' remaining constitutional claim.

1712 (1986). After Penofsky had exercised eleven peremptory challenges, counsel for Linares objected that the prosecutor was using those challenges to exclude all Blacks and Hispanics from the jury. (Linares Petition at 23).[11] After a colloquy between counsel, the trial court stated that there had been no indication of discriminatory conduct on the part of either party. (*Id.* at 24). Jury selection continued and when complete, Penofsky had exercised peremptory challenges against one Hispanic juror (Maria Romano), one possibly Hispanic juror (Ms. Acensio), and three additional Black and Hispanic jurors. *Munoz*, 550 N.Y.S.2d at 694. Penofsky had also exercised a peremptory challenge against a juror he had initially sought to challenge for cause, on the grounds that her participation in an anti-apartheid demonstration demonstrated that she was hostile to police witnesses. (Linares Petition at 24). Petitioners now reassert their claim, raised at trial and on direct appeal, that Penofsky sought systematically to exclude minority groups from the jury. (Linares Petition at 25).

In order to make out a *prima facie* case of discrimination under *Batson*, petitioners must show (1) that they are members of a cognizable ethnic group; (2) that the prosecutor exercised his peremptory challenges to exclude members of that ethnic group from service on the jury; and (3) that the prosecutor's challenges and other conduct raise an inference that the prosecutor intentionally excluded potential jurors on the basis of race. 476 U.S. at 96, 106 S. Ct. at 1723. Petitioners cannot satisfy this standard. Although petitioners are Hispanic, which is a cognizable ethnic group, *United States v. Rudas*, 905 F.2d 38, 41 (2d Cir. 1990), they have not demonstrated that Penofsky exercised his peremptory challenges to exclude members of that ethnic group.[12] As noted above, at least one Hispanic woman was selected as a juror. In addition, at least

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11. The *voir dire* record has apparently been misplaced. (Linares Petition at 23 n.11). For purposes of this outline of events, we rely on Linares' statement of facts and the Appellate Division's account in *Munoz*.

12. In their papers, petitioners also focus quite heavily on Penofsky's conduct with regard to Black jurors. There is no indication that Penofsky deliberately excluded Black jurors on the basis of race.

two of the jurors ultimately chosen were Spanish-speaking, and another was Filipino. *Munoz*, 550 N.Y.S. 2d at 694.

In addition to being misplaced, the *voir dire* "record" before the Court is so unreliable as to defeat petitioners' *Batson* claims. No systematic effort was made during jury selection to determine the races of potential jurors. The *Batson* claims are based instead on trial counsel's statements, *after voir dire* was completed, that Penofsky had struck seven Black and Hispanic jurors. That counsel utilized the subjective and unreliable criteria of surnames is obvious from his statement that "Romano" is a Hispanic name, when it may well have been an Italian derivative.[13] Moreover, the names of any married women on the panel may have denoted their husband's ethnicity rather than their own. The record also reflects that one of the jurors challenged by Penofsky was Irish, despite co-counsel's initial complaint that another minority member was being excluded.

In sum, the record below regarding petitioners' *Batson* claims does not support a reasonable inference that Penofsky excluded jurors on account of their race. Indeed, the trial judge, who was present during jury selection and had the opportunity to observe Penofsky's conduct first-hand, determined that Penofsky was not excluding potential jurors based on their race. Given the other relevant circumstances, including the composition of the jury finally selected, petitioners have not made out a *prima facie* showing that the prosecutor contravened the *Batson* rule. Thus, the burden never shifted to the prosecutor to come forward with a racially neutral explanation for his challenges. *Batson*, 476 U.S. at 97, 106 S. Ct. at 1723.

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13. Although the Second Circuit has apparently not addressed the issue, other courts have specifically found that "the spelling of a person's surname is insufficient -- standing alone -- to show that he or she belongs to a particular ethnic group." *United States v. Campione*, 942 F.2d 429, 433 (7th Cir. 1991).

3. Ineffective Assistance of Counsel

Linares' final claim is that he was denied effective assistance of counsel when his trial attorney failed to investigate possible alibi witnesses and gave an inadequate closing argument. (Linares Petition at 31). The standard for ineffective assistance of counsel is stringent. Linares must demonstrate not only that defense counsel's conduct fell below an objective standard of reasonableness, he must also show that but for defense counsel's errors, the result of the trial would likely have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984).

Nothing presented by Linares suggests either that his trial attorney's presentation of the case was inadequate or that the result of the case would have been different had defense counsel acted differently. Linares' attorney apparently failed to investigate and present three witnesses who stated that they would have testified that Linares was attending a party with them on the night of the alleged drug sale. (Linares Petition at 32-34). Given the overwhelming evidence that Linares participated in the drug transaction at issue,[14] it was reasonable for defense counsel to conclude, as a strategic matter, that presenting testimony of the alleged alibi witnesses would be damaging to Linares' case. Moreover, had all three witnesses testified consistently with their affidavits submitted by Linares, the result of the trial would not likely have been different.

Defense counsel's summation was also more than adequate. Given the strength of the prosecution's evidence, defense counsel

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14. The prosecution presented the testimony of Detective Jose Franceschi, Special Agent Jefferson Moran, and Eduardo Flores, a confidential informant. These witnesses testified that they met with Linares to set up the drug sale, went with him to an apartment building (along with a number of co-defendants) and ultimately purchased the drugs from Munoz and some co-defendants outside that apartment building. According to the testimony, Linares was an active participant in the sale, who was present at the location where the sale was made, even if he was not directly responsible for that sale.

could do little more than challenge the credibility of the prosecution's witnesses and question the procedures followed by the police, which he did. Linares was not denied effective assistance of counsel in this regard.

4. Failure to Permit Witness to Testify

Munoz final constitutional claim[15] is that he was deprived of the right to present witnesses. According to Munoz, the trial court refused to grant an adjournment in order that he might locate a defense witness, and further refused to permit that witness to testify when she arrived in court.

On the last day of the People's case, Munoz requested a one day adjournment so that he could locate a Martha Cecelia ("Cecelia"), a witness who would testify on his behalf. The trial court granted that request. The following morning, Cecelia failed to appear, and counsel requested a final adjournment until 11:00 a.m. The court waited until 11:07 a.m., and, when the witness had not yet arrived, ordered defense counsel to begin their closing statements. Cecelia apparently appeared in court at 12:30 p.m., but because the court was on lunch break, it was not notified of her presence until 2:00 p.m. At that point, the trial court refused to allow the evidence to be reopened to permit her to testify. *Munoz*, 550 N.Y.S.2d at 694.

The trial court did not abuse its discretion or deny Munoz a fair trial by making this ruling. By the time Munoz' witness arrived at court, defense counsel had been giving closing statements for at least an hour and a half. In fairness to the other defendants, the trial court would have had to permit any defense counsel who wished to alter their statement an opportunity to do so after the witness had testified. After having already afforded Munoz a reasonable opportunity to locate his witness and have her present to testify, the trial court was not required to continue to delay the trial and reopen

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15. Munoz also challenges the adequacy of the indictment. Because this claim does not raise an issue of federal constitutional law, as required by 28 U.S.C. § 2254(a), it cannot be considered here.

the evidence, particularly where the witness' testimony was only tangential to guilt or innocence. (Respondent's Brief at 43) (defense counsel represented that witness would testify that undercover police officer drank beer and asked co-defendant for pills prior to arrest).

For the foregoing reasons, the petitions are denied in all respects.

SO ORDERED.